

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Vincent D. Maloney,

Complainant,  
vs.

Patrick Oman,

Respondent.

ORDER FINDING  
NO PRIMA FACIE VIOLATION AND  
DISMISSING COMPLAINT

On August 10, 2006, Vincent D. Maloney filed a Complaint with the Office of Administrative Hearings alleging Patrick Oman violated Minn. Stat. §§ 211B.03 and 211B.06 by using the term "re-elect" on his campaign material.

The Chief Administrative Law Judge assigned this matter to the undersigned Administrative Law Judge on August 10, 2006, pursuant to Minn. Stat. § 211B.33. A copy of the Complaint and attachments were sent by FAX and by United States mail to Mr. Oman on August 10, 2006.

After reviewing the Complaint and attachments, the Administrative Law Judge finds that the Complaint does not state prima facie violations of Minn. Stat. §§ 211B.03 or 211B.06.

Based upon the Complaint and the supporting filings and for the reasons set out in the attached Memorandum,

**IT IS ORDERED:**

That the Complaint filed by Vincent D. Maloney against Patrick Oman is DISMISSED.

Dated: August 11, 2006

/s/ Bruce H. Johnson  
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BRUCE H. JOHNSON  
Administrative Law Judge

## NOTICE

Under Minn. Stat. § 211B.36, subd. 5, this order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. § § 14.63 to 14.69.

## MEMORANDUM

The Respondent, Patrick Oman, is a former Mower County Attorney who is seeking the office again in the upcoming election.<sup>[1]</sup> The Complaint alleges that Mr. Orman was defeated by a Mr. Flanagan in the 2002 election for County Attorney, and that Mr. Oman is improperly using the term “reelect” on his campaign posters. The Complaint alleges that only incumbents may use the term “reelect.”

Minn. Stat. § 211B.03 specifically governs the use of the word “reelect” in campaign material:

A person or candidate may not, *in the event of redistricting*, use the term “reelect” in a campaign for elective office unless the candidate is the incumbent of that office and the office represents any part of the new district. [Emphasis supplied.]

However, by its terms Minn. Stat. § 211B.03 only prohibits the use of the term “reelect” by candidates for offices in new districts that have been created as a result of redistricting. It does not prohibit or restrict the use of the term “reelect” by candidates for any other offices or in any other situations. Therefore, the allegation that Mr. Orman violated Minn. Stat. § 211B.03 by using the term “reelect” on his campaign posters is dismissed.

The Complaint also alleges that Mr. Oman’s use of the term “reelect” violated Minn. Stat. § 211B.06, subd. 1, which prohibits intentional participation:

... [i]n the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

In substance, the Complaint alleges that Mr. Oman once served as Mower County Attorney but that he is no longer the incumbent. The Complaint alleges that his use of the term “reelect” with reference to his candidacy for that office in the current election, in which he is no longer the incumbent, is a false statement within the meaning of Minn. Stat. § 211B.06, subd. 1.<sup>[2]</sup>

The dictionary defines “reelect” simply as “to elect again.”<sup>[3]</sup> In other words, the way in which dictionaries define the word “reelect” is broad enough to refer both to the incumbent in an elected office and to a person who was once an incumbent, who left the office, but who later seeks election to that office again. That having been said, the most common and normal use of the word “reelect” is with reference to a person who currently occupies an office.<sup>[4]</sup> It would therefore be fair to say that use of the term “reelect” by a candidate who was once an incumbent, who left the office, but who is seeking election to that office again in a later election may be misleading to a prospective voter—that is, it might imply that the candidate was the current incumbent.

In this ALJ’s view, Mr. Oman’s use of the word “reelect” in his posters is sufficiently ambiguous to make his statement something less than “clearly false” yet potentially “misleading” to some voters. The inquiry must then turn to the question of whether the legislature intended in Minn. Stat. § 211B.06 to impose punishment for disseminating statements found to be “misleading,” as well as those found to be “clearly false.” For the reasons discussed below, this ALJ concludes that the legislature did not intend that result.

The statute expressly refers only to the word “false.” There is no express statutory reference to the word “misleading.” The *Merriam-Webster Online Dictionary*<sup>[5]</sup> offers the following definition of the word “false,” as used in the context of Minn. Stat. § 211B.06:

**2 a** : intentionally untrue <false testimony> **b** : adjusted or made so as to deceive <false scales> <a trunk with a false bottom> **c** : intended or tending to mislead <a false promise>

In other words, the dictionary definition of “false” includes a continuum of meanings ranging from “intentionally untrue,” on one end of the scale, to “tending to mislead,” on the other end. The question here is whether the legislature intended the statute to apply in cases involving all of those senses of the word false or whether it intended there to be a boundary for liability along some point in the continuum. A second question is whether there is any constitutional limit to where along the continuum a boundary can be established.

First, “intentionally untrue” provides a relatively objective standard of legal liability. But when one looks at the more expansive end of the spectrum of meanings, false in the sense of “tending to mislead” could range from “extremely misleading” to “slightly misleading.” The problem is determining a standard for establishing how misleading a statement must be in order to be classified as a false statement for purposes of Minn. Stat. § 211B.06. It would seem that at some point along that part of the spectrum one runs into substantive Due Process vagueness problems, First Amendment speech problems, or both.

Second, unlike some statutory schemes, neither Chapter 211B nor Minn. Stat. § 211B.06 contains an explicit expression of legislative purpose or intent.

But there are aspects of Chapter 211B that do tend to shed light on legislative intent. As previously discussed, Minn. Stat. § 211B.06, subd. 1, only prohibits the making of statements that are “false”:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, *that is false*, and that the person knows is false or communicates to others with reckless disregard of whether it is false. [Emphasis supplied.]

On the other hand, another provision of Chapter 211B, Minn. Stat. § 211B.02 provides:

A person or candidate may not knowingly make, directly or indirectly, *a false claim stating or implying* that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so. [Emphasis supplied.]

Both provisions were codified in substantially their current forms in 1975.<sup>[6]</sup> By referring to “false implications,” Minn. Stat. § 211B.02 more clearly evidences a legislative intent to include “intentionally misleading” acts within that statute’s prohibitions than does Minn. Stat. § 211B.06, subd. 1, which lacks any reference to statements that are not clearly false. Therefore, application of the canon of construction, “inclusion of one thing indicates exclusion of the other”,<sup>[7]</sup> suggests that the legislature did not intend Minn. Stat. § 211B.06, subd. 1, to apply to impliedly false—i.e., misleading—statements. Finally, until the legislature created civil remedies for violations of sections of Chapter 211B in 2004, the chapter provided only for criminal remedies. Minn. Stat. § 211B.06, subd. 1, is framed as a gross misdemeanor.

Another canon of construction, the Rule of Lenity, provides that laws whose purpose is to punish (usually by fine or imprisonment) must be construed strictly.<sup>[8]</sup> The reasoning behind the rule is the principle of fair notice—that is, the state should not impose penalties upon people without clearly warning them about conduct that is considered unlawful and its consequences. Since there appear to be no court decisions construing Minn. Stat. § 211B.06, subd. 1, or its prior iterations broadly enough to include statements that are only misleading, the better course in applying the principle of fair notice in this case is to find an absence of such legislative intent and to let the legislature clarify its intent in that

regard if it chooses to do so. This ALJ therefore concludes that the Complaint does not state a prima facie violation of Minn. Stat. § 211B.03 or §211B.06, subd. 1. The Complaint is therefore dismissed.

**B.H.J.**

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<sup>[1]</sup> Mr. Orman served as Mower County Attorney from 1990-2002.

<sup>[2]</sup> The Complainant attached a copy of the decision in *Bauman v. House Republican Campaign Committee*, OAH File No. 7-0320-16264-CV, in support of his Complaint. In that case, the panel concluded (and the Respondent conceded) that use of the word “re-elect” by candidates who had never previously held the offices sought rendered the campaign material false. Unlike the situation in *Bauman*, Mr. Oman has held the office before.

<sup>[3]</sup> See both MERRIAM-WEBSTER ONLINE DICTIONARY (2006 ed.) and AMERICAN HERITAGE DICTIONARY (2<sup>nd</sup> ed. 1991).

<sup>[4]</sup> That was clearly the meaning that the Legislature had in mind in enacting Minn. Stat. 211B.03, but the Legislature expressly confined its restrictions on the use of the term “reelect,” as it related to chapter 211B to redistricting situations rather than craft a definition of the word that applied to all of the sections of that chapter.

<sup>[5]</sup> 2006 edition.

<sup>[6]</sup> Minn. Laws 1975, ch. 284 §§ 2 and 4.

<sup>[7]</sup> See, e.g., *Harris v. County of Hennepin*, 679 N.W.2d 728, 731 (Minn. 2004).

<sup>[8]</sup> See, e.g., *In re the Welfare of C.R.M., child*, 611 N.W.2d 802, 805 (Minn. 2000).